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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 293

ARMOUR AND COMPANY, A CORPORATION,
Petitioner,

vs.

THE ALTON RAILROAD COMPANY, A CORPORATION, ET AL.,
Respondents.

BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

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Respondents.

THE OPINIONS BELOW AND THE REPORT OF THE INTERSTATE COMMERCE COMMISSION ON THE SAME SUBJECT MATTER.

The opinion of the United States District Court for the Northern District of Illinois, Eastern Division, dismissing the complaint, was filed May 31, 1939. It is reported in 27 Fed. Supp. 625, and appears at pages 46-55 of the record.

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit affirming the dismissal of the complaint was filed April 4, 1940; the opinion of the court on rehearing was filed May 21, 1940. Both opinions are reported in 111 F. (2d) 913, and at pages 77-86, and 91-92 of the record.

A proceeding before the Interstate Commerce Com-

mission to which Armour and Company was a party, involving the same subject matter as that of the complaint herein, was initiated shortly prior to the commencement of this case, was decided April 8, 1940, and is reported in 238 I. C. C. 179. The official report of the Commission, together with the certificate of the Clerk of the Circuit Court of Appeals stating that the report is of record herein, is made an appendix to this brief.

STATEMENT OF THE CASE.

This is the brief of seventeen of the twenty-one respondents named in the complaint, which are trunk line railroads serving the Union Stock Yards at Chicago. That yard, operated by the Union Stock Yard and Transit Company of Chicago, is designated by the Secretary of Agriculture as a public stockyards pursuant to the Packers and Stockyards Act, 1921 (7 U. S. C. A. Sec. 202). (R. 7.)

For more than seventy years the Stock Yards Company has assessed a so-called yardage charge on all livestock received at the Union Stock Yards[1] and since the enact-

1. In *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193, 199 (1935), this Court referred to the yardage charge assessed by the Stock Yards Company as follows:

"Paragraph (5) of § 15 was passed February 28, 1920, during and presumably with knowledge of the controversy later brought here in *Adams* v. *Mills*, *supra*. While declaring that transportation of livestock to public stockyards shall include unloading without extra charge, it left undisturbed the Yards Company's practice of making a charge for livestock *received*. The Packers and Stockyards Act, approved August 15, 1921, subjects public stockyards to regulation by the Secretary of Agriculture. Section 301 (b) defines stockyards services to include, among other things, facilities furnished at a stockyard in connection with the *receiving*, holding and delivery of livestock." (Italics added.)

ment of the Packers and Stockyards Act in 1921 this charge has been published in the tariffs filed by the Stock Yards Company with the Secretary of Agriculture.

Throughout this entire period of seventy years, petitioner and all the other packers receiving livestock at the Union Stock Yards have paid the Stock Yards Company the charge which is presently assailed. They now contend, however, that it is the obligation of the railroads under "their contract of transportation" and in return for the freight rate which they receive, to provide the services and facilities required in handling the livestock after it is unloaded in the pens at the yards, and thus to relieve the packers of the charge assesed against them by the Stock Yards Company. (Complaint, paragraphs 23-25; R. 15, 16; Appendix, this brief, p. 180.)

The respondents have already taken the position that the transportation service and their obligation in respect to livestock consigned to the Union Stock Yards at Chicago end with the unloading of the animals into the pens at the yard.[1] In making their demand upon the respondent carriers for a change in the long standing practice the Chicago packers acted in concert. (R. 32-38; Appendix, p. 183.) Upon the rejection of this demand Armour took action both before the Interstate Commerce Commission, and, by this proceeding, in court; Swift and Company proceeded only before the Commission. Swift's complaint before the Commission alleged that the failure of the respondents to relieve it of the imposition of the charge by the Yard Company was an unreasonable practice in violation of the Interstate Commerce Act. (Appendix, p. 180.) Armour intervened in that proceeding in support of the complaint, advising the Commission

1. This Court so held in *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193, 201 (the so-called *Hygrade* case).

that it had instituted this proceeding in court "involving substantially the same issues and praying for similar relief."[1]

In the proceeding before the Commission respondents presented their defense upon the merits of the issue. At the same time they moved to dismiss the instant complaint on the ground that it presented administrative questions requiring the prior determination of the Interstate Commerce Commission. (R. 43-45.)[2]

The District Court held that the determination of what is embraced in the transportation service which the railroads are required to furnish on livestock delivered at the Union Stock Yards at Chicago, is an administrative question for the Interstate Commerce Commission. The

1. The following is quoted from the report of the Commission:

"Armour and Company filed a petition of intervention in support of the complaint. In this petition it was stated that it had instituted a proceeding in the State Court of Illinois involving substantially the same issues, and praying for similar relief. The proceeding in the State court was subsequently removed to the United States District Court for the Northern District of Illinois, Eastern Division, and motions by defendants to dismiss were sustained May 31, 1939." (This refers to the date of the dismissal by the District Court.) (Appendix p. 180.)

2. Dismissal of the complaint was asked on the ground also that there was a nonjoinder of the Union Stock Yard and Transit Company of Chicago, which is an indispensable party to the determination of the suit for the reason that the yardage charge complained of is assessed and retained by the company, and the unloading is performed on its premises and by its employees. (R. 44.) The trustees of several of the respondent carriers in the process of reorganization under Section 77 of the Bankruptcy Act, asked dismissal on the ground that the action could not be maintained without leave of the court which appointed them. (R. 74-75.) The District Court sustained the motions to dismiss on these two grounds as well as upon the principal ground that the complaint presented an administrative question for the Commission. (R. 54-55.) The Circuit Court of Appeals sustained the District Court on the latter ground and found it "unnecessary to rule" on the other two points. (R. 86.)

Circuit Court of Appeals affirmed the dismissal by the District Court, stating:

> "To solve this controversy it is necessary to determine what in actuality the service is that is being rendered, whether it is one which the rail carriers are bound to furnish, and whether it is already included in the line-haul rate. The inquiry necessarily compels recourse to certain facts, such as the history of the Chicago stockyards; the use of these yards as the carriers' usual place of delivery; the history of the yardage charge; the tri-party relation; and many other intricate facts of transportation incidental to rate-making.
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> * * * * * * *
>
> "Our conclusion is that this case presents a controversy whose solution necessitates the exercise of administrative discretion, and therefore prior administrative resort is imperative." (R. 84.)

Although petitioner has sought throughout this proceeding to argue the merits of the administrative question presented by its complaint, just as it does in its brief in this Court, the sole issue has been one of procedure as the courts below have held. During the progress of the proceedings in court, however, the Commission proceeded to conduct hearings in the case before it on the merits of the administrative question presented. On an extensive record and a full showing of the very character of evidence upon which the Circuit Court of Appeals declares the administrative question must be decided, the Commission has decided the administrative question adversely to the contention of the packers, holding that the transportation of these shipments and the obligation of the respondent carriers end with the unloading of the livestock into pens at the yards.

The Commission's report, published a few days after the decision of the Circuit Court of Appeals, was brought to the attention of the court by Armour and Company

with its petition for rehearing in which Armour contended that the administrative question having been decided by the Commission, the Circuit Court of Appeals should remand this case to the District Court for trial. It was in response to that contention that the court below in its opinion on rehearing stated:

> "Since our decision the Interstate Commerce Commission has adjudicated the administrative problems against Armour, i.e., it has found that the transportation of livestock consigned for delivery at this common livestock depot ends at the unloading pens and that hence the carriers' failure to afford free egress is not an unreasonable practice."
>
> * * * * *
>
> "* * * the adverse administrative adjudication, unless disturbed in proper course, stands in Armour's way." (R. 91-92.)

SUMMARY OF ARGUMENT.

1. The alleged conflict in the decisions of this Court as to where transportation of livestock to a public stockyards terminates is irrelevant. Even if there were such a conflict, and there is not, it could not be resolved by granting a writ of certiorari in this case since the only issue here is whether the Interstate Commerce Commission has exclusive primary jurisdiction of petitioner's complaint, as the courts below have held. The cases alleged by petitioner to be conflicting on the merits establish that the issues presented by the complaint are administrative and require preliminary resort to the Commission.

2. The Circuit Court of Appeals has not departed from the usual and accepted procedure by finding that there is a tri-party relationship between petitioner, respondents and the Stock Yards Company.

3. The complaint constitutes an attack upon a long established practice and requires a determination of (a) whether the services and facilities provided at the Chicago Union Stock Yards are part of transportation or whether they are provided after transportation, and the responsibility of respondent carriers, has terminated, (b) the adequacy of the delivery facilities and services at those yards, and (c) the reasonableness of the rates of the Stock Yards Company. This Court has repeatedly and consistently held that such issues require preliminary resort to the Commission.

4. This suit is not one for loss or damage to the shipments and decisions that loss and damage cases may be decided by the courts without preliminary action of the Commission are irrelevant here.

5. The complaint is based on alleged violations of the Interstate Commerce Act which necessitate the preliminary administrative decision of the Commission.

6. The issues and facts of this case are identical with those in *Swift & Co. et al.* v. *Alton Railroad Co. et al.*, 238 I. C. C. 179, in which petitioner was a party. In that case, decided while the instant case was pending in the Circuit Court of Appeals, the Commission decided the issues adversely to the packers. That administrative adjudication is binding upon petitioner unless set aside in proper proceedings upon review.

REASONS FOR DENYING THE WRIT.

1. The Alleged Conflict in the Decisions of This Court.

The first proposition argued by petitioner is that there is a conflict in the decisions of this Court with respect to whether transportation of livestock to a public stockyards terminates at the unloading pens or continues to some point beyond. (Petition, pp. 10, 11-15.) The contention has no relevance here. The courts below did not pass upon that question nor did they decide that petitioner did or did not have a right to demand that respondent carriers change the established delivery practices at the Chicago Union Stock Yards. Instead, the decisive ruling was that the courts could not and should not pass on such a question in the absence of a prior administrative decision on petitioner's complaint. In other words, if it be assumed that there is a conflict in the decisions as to where transportation of livestock to the Chicago Union Stock Yards ends, as there is not, such a conflict could not possibly be resolved by granting the writ of certiorari. The lower courts have made no finding on that issue; on the contrary, they have held that the question, and the other administrative questions presented by the complaint, are of a character of which the Commission has exclusive primary jurisdiction. More specifically, petitioner's argument that the rule laid down in the *Hygrade* case[1] should "be reversed or clarified" by this Court (Petition, p. 15) is quite beside the point since neither of the lower courts ruled on the administrative questions raised by the complaint as to the scope of

1. *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193 (1935).

transportation and the reasonableness of the established delivery practices, and they are not now before this Court for reconsideration.

In one particular, however, the cases cited by petitioner in an effort to show a conflict in the decisions of this Court as to what is embraced in the transportation service on livestock consigned to public stockyards are germane. The fact is that in every one of the cases decided since the passage of the Interstate Commerce Act and cited by petitioner as being identical with or substantially similar to the present case, the case was decided by the Interstate Commerce Commission in the first instance, as an administrative matter, and it was the findings and orders of the Commission which were reviewed by this Court, *Adams* v. *Mills*, 286 U. S. 397 (1932); *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193 (1935) (commonly referred to as the *Hygrade* case); *Union Stock Yard and Transit Co.* v. *United States*, 308 U. S. 213 (1939).[1]

In the *Hygrade* case, *supra*, the Commission, and thereafter this Court, dealt with the identical issue again presented by Armour's complaint here, and decided it adversely to petitioner as recognized in the petition for certiorari. Not only is there no conflict between those cases as petitioner contends, but they directly support the principle that the issues presented both there and here are administrative and require preliminary resort to the Interstate Commerce Commission.

1. The only other case cited by petitioner in this connection arose and was pending in the courts before the enactment of the Interstate Commerce Act creating the Interstate Commerce Commission. *Covington Stock Yards Co.* v. *Keith*, 139 U. S. 128 (1891). The Interstate Commerce Commission was created and the doctrine requiring preliminary resort to a single body on administrative questions relating to railroad transportation was established, for the purpose among others of avoiding conflict and discrimination arising from the previous concurrent jurisdiction of the courts.

2. The Alleged Departure of the Circuit Court from the Usual and Accepted Procedure.

Petitioner's second proposition is that the Circuit Court departed from the usual and accepted procedure by finding "that a 'tri-party' contractual 'relationship' existed" between petitioner, the respondents, and the Stock Yards Company. (Petition p. 15.) Petitioner argues that "the complaint establishes that no contractual relationship" existed between petitioner and the Stock Yards Company. (Petition pp. 15, 16.) The fact is that the court nowhere referred to a "contractual" relationship. The word is gratuitously added by petitioner to the court's statement that there was a "tri-party relationship," a statement which can hardly be questioned. (R. 83, 84.)

In the same connection petitioner urges as a reason for granting certiorari that the Circuit Court said that "in substance the complaint states a claim based on overcharge." (Petition p. 16; R. 82.) Petitioner's argument is that there is no overcharge because the respondents received no more payment than their published line-haul rate. But this ignores what is the essence of the complaint. Petitioner seeks the repayment of charges which were assessed and collected by another common carrier, the Stock Yards Company, in accordance with a tariff filed with the Secretary of Agriculture but not published with the Commission. It is contended that the facilities and services furnished on these shipments by the Stock Yards Company for which the disputed charge was levied should constitute a part of transportation and that compensation is included in the line-haul rate. Although all of these contentions have been denied by this Court or by the Commission in the *Hygrade* and the *Swift* cases, nevertheless the theory of the complaint, of necessity,

is that the petitioner has been charged an excessive amount for what is alleged to be a part of the transportation services, in other words, as the court designates it, an "overcharge."

3. The Alleged Conflict of the Circuit Court's Decision With Other Cases.

In its third point, petitioner argues that the decision below is in conflict with those cases which have held that where no administrative questions are involved the courts have concurrent primary jurisdiction with the Commission. Petitioner would thus avoid the fact that the complaint here does present administrative issues of the character which this Court has uniformly held to require preliminary resort to the Commission. The District Court outlined the petitioner's demands for a change in the method of delivery at the Chicago Union Stock Yards,[1] and found that the complaint comes "squarely within the rule" laid down by this Court in *Great Northern Ry.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922) as to the necessity for preliminary resort to the Commission when, as here, the "enquiry is essentially one of fact and of discretion in technical matters; and uniformity can be secured only if its determination is left to the Commission." (R. 53.) The Circuit Court came to the same conclusion, summarizing the exclusively administrative issues in the por-

1. It is admitted in the complaint that for many years prior to May 25, 1933, the petitioner made "similar shipments of livestock to itself at Union Stock Yards, Illinois" and that the transportation thereof had been completed and the contract had been completely performed by respondents before their removal from the Union Stock Yards. (R. 10, par. 15.) No change in the tariffs or in the contract is alleged but petitioner's position is that it may by its own demand upon the respondents extend the scope of transportation and increase the duties of respondents under the contract.

tion of the opinion quoted on page 5, *supra*. These issues are briefly described in the following paragraphs.

One of the most important of the issues raised by the complaint is whether the services and facilities provided at the Union Stock Yards after the unloading of these shipments are a part of transportation, or whether they are provided after transportation, and the responsibility of respondent carriers, has terminated. In *Adams* v. *Mills*, 286 U. S. 397 (1932) this Court held that the determination of the scope of the transportation service on inbound livestock shipments to the Chicago Union Stock Yards was not a pure matter of law but was a matter for the Commission, and that its conclusions could not be disturbed if there was evidence to sustain them. Mr. Justice Brandeis stated, for the Court, as follows:

> "Whether the unloading in the yards was a part of transportation was not a pure question of law to be determined by merely reading the tariffs. Compare *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, 294. The decision of the question was dependent upon the determination of certain facts, including the history of the Stock Yards and their relation to the line-haul carriers; the history of the unloading charge at these yards; and the action of the parties in relation thereto." (pp. 409-410.)

This Court has already held, therefore, that under the rule of the *Merchants Elevator* case, *supra*, relied upon by the lower courts, the very character of question raised by this complaint is an administrative one for the Commission. As long ago as 1913 this Court ruled that when the limits within which transportation begins or ends were questioned, "the Commission alone could act." *Mitchell Coal Co.* v. *Pennsylvania R. R.*, 230 U. S. 247, 263, 264. The determination of the scope of the transportation service on inbound livestock shipments at the Chicago Union Stock Yards falls squarely within this rule, as the courts below have held.

In addition to the determination of the scope of the transportation service, this complaint requires a decision upon the kind of delivery facilities and services which are necessary and adequate to meet the obligations of the respondents in return for the freight rates prescribed by the Commission[1] and under the terms of the livestock contract likewise prescribed by the Commission.[2] For example, to grant the mandatory injunction prayed for, which would change the long established practice, would require the court to determine what would be "suitable" ingress, and "proper and reasonable" egress at the Union Stock Yards. (R. 21.) But this Court has long held that the definition of the "services covered by a carrier's published tariffs" and the determination of the "character of equipment which it must provide" must be made by the Interstate Commerce Commission before they may be submitted to a court. *Loomis* v. *Lehigh Valley R. R.*, 240 U. S. 43, 50 (1916). These are matters which are peculiarly administrative and uniformity among shippers could not be preserved if they were not determined in the first instance by the Commission. *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285 (1922).

In addition, the allowance of damages for the past shipments would require the court to decide whether the yard-

1. *Livestock, Western District Rates*, 176 I. C. C. 1 (1931).

2. The gravamen of the complaint is that respondents failed and refused to provide certain services and facilities "all of which Defendants are required by their contract of transportation and by law to provide." (R. 16.) The "contract of transportation" upon which the complaint thus rests is the Uniform Live Stock Contract which was prescribed by the Commission itself. In *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193 (1935), (the *Hygrade* case), this Court in a case presenting the same ultimate issues as the one at bar, stated:

> "* * * the Interstate Commerce Commission, acting under authority of Sec. 15(1) and following a form of clause submitted by shippers and carriers, *prescribed a uniform livestock contract* * * *" (p. 198.)

age charges of the Stock Yards Company were unreasonably high, and if so, what the exact amount of the reasonable charge would have been at the different times the shipments were made. The Commission has held that the line-haul carriers have never been compensated for any services performed at the stockyards after the placement of the animals in the unloading pens. (Appendix, p. 188.) The line-haul rate contains no allowance for such services. Petitioner cannot be given these services free of charge; unless it has been required to pay more than a reasonable amount for such services, it has suffered no damage even on its theory that they are part of the transportation. But the determination of whether the rates of the Stock Yards Company for those services have been excessive is an issue which must be decided by the Commission in the first instance. This Court recently denied certiorari in a case, strikingly like the present one in respect to this point, where, as here, a shipper attempted to recover from a railroad the yardage charge of a stockyards company which had been levied for services which the plaintiff alleged were a part of transportation. *Aron* v. *Pennsylvania R. R. Co.*, 80 F. (2d) 100 (C. C. A. 2d, 1935), certiorari denied, 298 U. S. 658. The Circuit Court of Appeals there held that even assuming the services to be part of transportation:

> "The appellants did not, as they contend, suffer damages in the entire amount paid, but only in so far as the amount charged exceeded a reasonable rate for the services rendered." (p. 102.)
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> * * * * *
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> "The determination of damages in the instant case involves a finding of a reasonable rate, and the Court will not determine that question without a prior finding by the Commission." (p. 103.)

The same rule applies here; the determination of the complaint would require rate-making, and that is peculiarly the function of the Interstate Commerce Commission.

The foregoing discussion of the issues of this case has been rendered necessary by petitioner's claim that the decision below is in conflict with the cases cited on pages 20 and 21 of the petition where preliminary resort to the Commission, under the circumstances of those cases, was held to be unnecessary. The fallacy of this argument is that in none of those cases were there any such administrative issues as are presented in this complaint. In none of those cases was the plaintiff seeking a change in an established railroad practice for the future, and in none did the determination of damages for the past require a finding of the reasonableness of the rate charged. Nor was there any need in those cases to pass upon the scope of transportation or the adequacy of the delivery services and facilities. There is no such simple situation here presented as there was in those cases, and they do not conflict with the decision below.

Petitioner also urges that the decision of the Circuit Court conflicts with *Galveston, Harrisburg and San Antonio Ry.* v. *Wallace*, 232 U. S. 481 (1912), and *Atlantic Coast Line Railroad Co.* v. *Riverside Mills*, 219 U. S. 186 (1911). (Petition, p. 17.) In both of those cases the goods shipped had been lost and the suits were to recover their value. They were cited to the Circuit Court in connection with petitioner's argument that this "is the simplest 'loss and damage' suit imaginable." The contention was rejected because, as the Circuit Court stated: "it is obvious that the instant case is not a mere 'loss and damage suit.'" (R. 82.) In the complaint, there is no allegation that the livestock were lost, damaged or injured. Instead, the petitioner is here making a direct attack upon the long established delivery practice and seeks an order changing that practice for the future and granting damages for the past. (R. 21.) There is no comparison between such a suit and an action for mere loss and damage, and there is no con-

flict between the decisions that suits for loss and damage may be heard in the courts in the first instance and the decision that the issues presented by this complaint require preliminary resort to the Commission.

Mention should also be made of petitioner's reliance upon its contention that no violation of the Interstate Commerce Act is alleged in the complaint. If this argument means that there is no express reliance upon the Act in the complaint, the answer is that there is such express reliance and citation of the section of the Act relied upon. (R. 7, par. 6.) Even were this not the case, the question at all times, as the Circuit Court held, is one not of form but of actuality. (R. 82.) If the established practice of making deliveries at the Union Stock Yards, by which the line-haul carriers' responsibility terminates at the unloading pens, is not, in the words of Section 1(6) of the Interstate Commerce Act, both "just and reasonable" and is not all that is "necessary or proper to secure the safe and prompt * * * delivery of property," then there is a violation of the Act. On the other hand, if it is "just and reasonable" and is all that is "necessary or proper," then plaintiff has no complaint on any theory. As this Court held in *Midland Valley R. R.* v. *Barkley*, 276 U. S. 482, 485 (1928): "The law exacts only what is reasonable from such carriers. The reasonableness of the rule adopted by the carrier is a matter for the Commission."

THE INTERPRETATION OF THE PLEADINGS.

Much of the petition and the accompanying brief is devoted to an argument directed solely to an interpretation of the pleadings. It is insisted that the courts below should have read the complaint to mean that Armour did not elect to have these shipments delivered at the public stockyards known as the Union Stock Yards, but consigned them for delivery either at those yards or elsewhere. Even under

that construction of the pleadings there would remain the administrative issues discussed above requiring preliminary resort to the Commission. The fact is, however, that the complaint cannot be given that meaning, as both courts below have held.

Petitioner seeks to obtain a different interpretation of the complaint from that made below, in order to distinguish the case from this Court's adverse decision on the merits in the *Hygrade* case, *Atchison, T. & S. F. Ry.* v. *United States*, 295 U. S. 193 (1935) and from the Commission's adverse decision in *Swift & Company, et al.* v. *Alton Railroad Company, et al.*, 238 I. C. C. 179.) (Appendix, this brief.) It takes the position that those cases are distinguishable notwithstanding the fact that in the Circuit Court petitioner admitted that the issues of the *Hygrade* case were identical with those here, arguing that "it is apparent that plaintiff here demands no more than the Commission [in its decision in the *Hygrade* case which was set aside by this Court] had already found to be reasonable, at these same yards, from these same defendants." (Appellant's Supplemental Brief in Circuit Court, p. 25.) And in its petition for rehearing in the Circuit Court, referring to the decision of the Commission in the *Swift* case, petitioner stated: "Since the said decision of this Court, the Interstate Commerce Commission has fully considered and decided, the very administrative question referred to by the Court." (R. 88.)

Examination of the complaint will show that the Circuit Court was not only justified in rejecting the interpretation which petitioner urges but could have reached only the conclusion which it expressed as follows: "In fact, to give heed to the contention here is tantamount to our giving Armour permission to alter or modify the true character of the complaint. This we cannot do." (R. 92.)

It is plain from the terms of the complaint and attached

exhibits that the animals were and are being consigned by Armour for delivery at the Union Stock Yards, and that no request has been made for delivery at any other place. For example, the complaint states expressly that Armour has

> "* * * sought *only* to be permitted to take possession of its shipments of livestock at the unloading pens used by the Defendants as their depot or station *in the Union Stock Yards, Chicago, Illinois,* or at whatever point *therein* tender of said livestock was made and thence *to remove* said shipments of livestock to a public street, or to such other point *off the premises of said Stock Yards Company,* * * *." (R. 16, par. 24.) (Italics added.)

Similarly, in paragraph 4 of the complaint, petitioner defines its various references in the complaint to the "station or depot at Union Stock Yards, Illinois" as meaning the unloading pens and other facilities of the Stock Yards Company. After describing the facilities used in the unloading and delivery of all shipments here involved, the complaint continues as follows:

> "For many years, *the facilities of the Stock Yards Company,* above described, have been designated and used by each of the Defendants as their *station or depot, known as Union Stock Yards,* in the City of Chicago, Illinois, for the delivery of livestock consigned to commission merchants, packers and others buying, selling, or receiving livestock at, to or from Union Stock Yards * * *." (R. 6.) (Italics added.)

Furthermore, the Uniform Live Stock Contract which Armour attached to its complaint as evidencing the contracts made with the carriers provides that "the carrier agrees to carry to its *usual* place of delivery at said destination." (R. 23.) As shown above, the complaint establishes expressly that the "usual place of delivery" of these shipments to the Union Stock Yards was the facilities of the Stock Yards Company "known as Union Stock Yards, in the City of Chicago, Illinois" (R. 6), and that Armour

"contracted * * * for the transportation * * * and for delivery of such shipments to the Plaintiff, as consignee, at Union Stock Yards, Illinois." (R. 9.)

Similarly, petitioner's prayer for a mandatory injunction changing the delivery practices for the future asks that the defendant carriers be required to provide "for removal of its livestock from the unloading pens of the Defendants, or from such other point *in said station* where delivery may be tendered to Plaintiff, *at the Union Stock Yards* in Chicago, Illinois, * * *." (R. 21.)

Finally, in its prayer for a decree adjudging the duties of the carriers in respect to delivery, Armour describes the shipments as being those "consigned to it at Union Stock Yards, Illinois" (R. 21) which is the ' station or depot" defined at the outset of the complaint as the facilities of the Stock Yards Company. As held by the Circuit Court, petitioner's argument is merely an attempt to alter the complaint by "interpretation."[1] The complaint itself establishes that the shipments were consigned for delivery at the Union Stock Yards.

The petition contains several paragraphs at pages 17 and 18 purporting to be statements of what the Circuit Court held, accompanied by the citation of cases alleged to be in conflict with the Circuit Court's decision as so stated. The statements of the holding are quite inaccurate, since

1. To avoid misunderstanding, it should be noted that at frequent places in the petition and accompanying brief petitioner states the complaint as if it read the way petitioner's rejected interpretation would have it read. For instance, in the summary of the complaint, at the outset of the petition, petitioner states that it desired delivery "either at the public stock yards 'or at such other point at which delivery was tendered.'" (Petition p. 3.) There is no such reference to "the public stock yards" in the complaint and the alternative, as clearly stated in paragraph 24 of the complaint, quoted above, was for delivery "at the unloading pens used by the defendants 'as their depot or station in the Union Stock Yards, Chicago, Illinois, or at whatever point *therein* tender of said livestock was made.'"

they are set forth as if the Circuit Court had adopted petitioner's interpretation of the complaint where in fact that interpretation was argued to the Court in the petition for rehearing (R. 88-89) and expressly rejected in the opinion denying that petition. (R. 91.) The cases cited in that part of the petition as conflicting with the alleged holdings of the Circuit Court are the ones discussed above at pages 9 and 15. They not only do not conflict with the decision here, but directly support the principle that the issues of the complaint require preliminary resort to the Commission.

The remaining cases which are alleged to conflict with the decision here are *Phillips* v. *Grand Trunk Ry.*, 236 U. S. 662 (1915) and *Lowden* v. *Simonds-Shields-Lonsdale Grain Co.*, 306 U. S. 516 (1939) (Petition p. 19). These cases are cited as authority for petitioner's contention that the Commission's decision in the *Swift* case (Appendix, this brief) eliminates the need for preliminary resort here. In those cases a rate had been held by the Commission to be unreasonable. Here the Commission's ruling is exactly opposite, namely, that the practice assailed by the packers was and is reasonable and proper. That decision is binding upon all parties thereto including Armour, unless set aside in proper proceedings upon review in the courts.

It may be noted that Armour seeks to use that decision of the Commission as a substitute for the preliminary resort which is necessary on the administrative issues here presented but at the same time urges that the decision of the Commission, which was adverse to the packers, does not apply here. It is said that the Commission's decision involves "the same subject matter (but not the same factual or contractual status)" (Petition p. 19). Thus petitioner seeks to avail itself of the fact that the issues have been decided and at the same time to avoid

the consequences of their having been decided adversely by arguing that the facts were different.

We submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

The following appendix consists of a copy of the decision of the Interstate Commerce Commission in *Swift & Company, et al.* v. *Alton Railroad Company, et al.*, 238 I. C. C. 179 (April 8, 1940), together with a copy of the certificate of the Clerk of the Circuit Court of Appeals stating that the *Swift* decision was made part of the record herein.

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INTERSTATE COMMERCE COMMISSION

No. 27862

SWIFT & COMPANY ET AL. v. ALTON RAILROAD COMPANY ET AL.

Submitted June 21, 1939. Decided April 8, 1940

1. Transportation of direct shipments of livestock consigned to complainant at the Union Stock Yards, Chicago, Ill., found to be completed when the livestock is placed in the unloading pens at the Union Stock Yards. Yardage charges assessed by the Union Stock Yards & Transit Company of Chicago on direct shipments of livestock transported to the Union Stock Yards for services performed, and facilities used beyond the gates leading from the pens in the stock yards, into which the livestock is unloaded from railroad cars, found not subject to the jurisdiction of the Commission.
2. Defendants' failure to afford egress for direct shipments of livestock transported to the Union Stock Yards found not to have resulted or to result in an unreasonable practice.
3. Complaint dismissed.

R. D. Rynder for complainants.

Paul E. Blanchard for intervener.

H. R. Park for interested party.

Douglas F. Smith, *Kenneth F. Burgess*, and *Robert Thomas* for defendants.

Report of the Commission

Splawn, *Commissioner:*

Exceptions were filed to the examiner's report by complainant; defendants replied; and the parties were heard in argument.

Complainants are Swift and Company, and G. H. Hammond Company and Omaha Packing Company, wholly owned subsidiaries of Swift & Company. They, with the exception of G. H. Hammond Company, are engaged in the packing-house business and operate packing plants for the processing of livestock at Chicago, Ill. G. H. Hammond Company formerly operated a packing plant, but since the complaint was filed operation of the plant has ceased. Complainants' plants are located adjacent to the Union Stock Yards in Chicago, owned and operated by The Union Stock Yard and Transit Company of Chicago, hereinafter referred to as the Yard Company. The defendants are common carriers by railroad engaged in the transportation of livestock to Chicago. The Yard Company is not

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named a defendant. Although livestock consigned to G. H. Hammond Company and Omaha Packing Company at the Union Stock Yards has arrived at those yards in the past, the volume of shipments so consigned has been small. The bulk of the traffic about which complaint is made has been consigned to Swift & Company. For convenience, Swift & Company will be referred to as if it were the only complainant.

It is alleged, in substance, by complaint filed September 20, 1937, that defendants' failure to afford the right of egress for livestock from unloading pens at the Union Stock Yards to the nearest public street, in connection with direct shipments of livestock consigned to complainant, free from any charge other than the line-haul rate, has resulted and results in an unreasonable practice. We are asked to require defendants to cease and desist from the alleged unlawful practice, and to establish and maintain reasonable means of egress from the unloading pens at the Union Stock Yards to the public streets free from the payment of any charges other than the line-haul rate. We are also asked to award reparation to each complainant for charges paid by reason of the alleged unlawful practice during the period of 2 years preceding the filing of the complaint and during the pendency of this proceeding.

Armour and Company filed a petition of intervention in support of the complaint. In this petition it was stated that it had instituted a proceeding in the State Court of Illinois involving substantially the same issues, and praying for similar relief. The proceeding in the State court was subsequently removed to the United States District Court for the Northern District of Illinois, Eastern Division, and motions by defendants to dismiss were sustained May 31, 1939.

The situation complained of may be described as follows. A carload of livestock is shipped from a point in Iowa, consigned to Swift & Company at the Union Stock Yards in Chicago. This is known as a direct shipment, as distinguished from a shipment consigned to a commission merchant at the stockyards for sale. Under the provisions of section 15 (5) of the Interstate Commerce Act, the transportation includes delivery of the livestock into suitable pens at the stockyards at the line-haul rate without extra charge to the shipper or consignee. The livestock is transported by defendants to unloading platforms on the property of the Yard Company. Upon arrival of the car at the unloading platform, the car door is opened by employees of the Yard Company and the livestock is driven by employees of the same company through chutes into unloading pens adjacent to the unloading platforms. The unloading platforms, chutes, and pens are owned by the Yard Company. If employees of

Swift & Company are at the unloading pens when the animals are placed therein, the animals are driven by Swift & Company's employees from the unloading pens through the property of the Yard Company to Swift & Company's plant located outside of the stockyards. If employees of complainant are not at the unloading pens when the animals are placed therein, and if the volume of livestock arriving at the unloading pens is sufficient to necessitate immediate removal of the animals from the loading pens to holding pens located throughout the yards, the animals are driven from the unloading pens to holding pens in the stockyards by employees of the Yard Company, and are later driven from the holding pens through the Yard Company's property to Swift & Company's plant by employees of the latter company. Irrespective of whether possession of the animals is taken at the unloading pens or at the holding pens by Swift & Company's employees, Swift & Company is required to pay a yardage charge on each animal. This yardage charge is assessed, collected, and retained by the Yard Company, under authority of a tariff filed by that company with the Secretary of Agriculture.

Complainant's claim is that delivery of the livestock into suitable pens at the stockyards includes delivery to it in such manner as to permit the animals to be removed by its employees from the unloading pens to the nearest public street without the payment of a yardage charge. It seeks to be relieved of the payment of the yardage charge on shipments of livestock consigned to it at the Union Stock Yards.

A complaint containing issues substantially similar was considered by the Supreme Court in *Atchison T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193, in which our order in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, was set aside. Complainant contends that it is presenting a case different from that considered and decided in the above proceedings.

The Union Stock Yards, owned and operated by the Yard Company, is located in Chicago and is the terminal at which the preponderant amount of the livestock transported by rail to Chicago is received. It is the largest livestock market in the United States and is the only public market for the sale of livestock in Chicago. Immediately west of the Union Stock Yards is an area commonly known as Packingtown. The plants of Swift & Company and other packers are located in this area. It is physically impossible to remove livestock from the unloading pens in the stockyards to complainant's plant or to public streets except by use of the Yard Company's property. The Yard Company, with respect to part of its business, is a common carrier of freight by hire, is engaged in interstate com-

merce, and is subject to the Interstate Commerce Act.[1] It is also a stockyard owner as that term is defined in the Packers and Stockyards Act.[2] As such, it is engaged in operating a public stockyard. In the operation of its business as a stockyard owner, it is subject to the jurisdiction of and regulation by the Secretary of Agriculture.

The Yard Company has a tariff on file with the Secretary of Agriculture, in which it publishes yardage charges applicable on all livestock received at the Union Stock Yards. These charges are 45 cents per head on cattle, 35 cents on calves (400 pounds or under), 15 cents on hogs, and 10 cents on sheep, and are assessed and collected by the Yard Company on every animal unloaded from railroad cars at the stockyards.

With respect to direct shipments, these charges are compensation for services performed by the Yard Company after the stock is placed in unloading pens and for the use of its facilities, such as holding pens, alleys, and ways in the stockyards. With respect to shipments consigned to commission men, the yardage charges cover, in addition to the services on direct shipments, use of the Yard Company's facilities pending the sale of the livestock, and the use of facilities for removal of the stock from the yards after it is sold.

The tracks of the line-haul carriers do not reach the stockyards, which are served exclusively by tracks owned by the Yard Company and leased by it to The Chicago River and Indiana Railroad Company. By authority of trackage rights and the use of their own crews and power, all livestock consigned for delivery at the stockyards is placed by the trunk lines on the tracks adjacent to the unloading platforms. When the livestock reaches the unloading platforms, no one is permitted by the Yard Company to handle the animals except employees of that company. This is necessary for the efficient and orderly handling of the large number of shipments arriving at the yards.

The bulk of the movement is received at the yards during the first days of the week, and approximately three-fourths of the daily movement is unloaded between 3 and 8 a. m. In some instances, immediate removal of the animals from the unloading pens is necessary to preserve an even flow of livestock from the cars into the yards.

During the more than 70 years of its existence the Union Stock Yards has been the principal terminal at which livestock consigned

[1] *United States* v. *Union Stock Yard & Transit Co.*, 226 U. S. 286; *Livestock Loading and Unloading Charges*, 52 I. C. C. 209; *Livestock Loaded and Unloaded at Chicago*, 213 I. C. C. 330; *Cancelation of Livestock Services at Chicago*, 227 I. C. C. 716; *Union Stock Yard & Transit Co.* v. *United States*, 308 U. S. 213.

[2] Sections 201 to 229 of the Packers and Stockyards Act, title 7, U. S. C. A.

to Chicago has been received. Since the beginning of its operations, the Yard Company has assessed and collected from the shipper a yardage charge on every animal unloaded on its premises, irrespective of whether the shipments were direct shipments to a packer or whether they were consigned to a commission merchant for sale. Prior to 1927 the number of direct shipments received at the Union Stock Yards by complainant was relatively small. About that time, various conditions combined to make it necessary for the packers, including complainant, to purchase livestock in greater quantities at country points, and to have such shipments consigned to them at Chicago. By 1929 the number of direct shipments to complainant at the stockyards grew to a substantial amount. This condition continued for several years until complainant began to consign its direct shipments to the plant of its subsidiary, Omaha Packing Company, located approximately 2 miles from the Union Stock Yards. Thereafter the number of direct shipments consigned to complainant at the stockyards decreased. During the first 4 months of 1938, 18 cars of direct shipments were received by complainant at the Union Stock Yards. At the hearing herein it was stated that practically all of complainant's direct shipments are being made to the plant of the Omaha Packing Company and that no such shipments are being received at the Union Stock Yards. By having its shipments consigned to the plant of the Omaha Packing Company, complainant is relieved of the payment of the yardage charge. The stock received at the plant of the Omaha Packing Company is transported by motor-truck over the streets in Chicago to complainant's plant.

In May 1933 complainant advised the traffic officers of defendants and the Yard Company that it was prepared to accept direct shipments of livestock at the reasonable and proper pens of each defendant at the Union Stock Yards, and to remove the livestock to its own plants within a reasonable time without other use of the Yard Company's facilities; and that on and after May 25, 1933, it would refuse to pay any yardage charges on direct shipments consigned to it at the Union Stock Yards. The Yard Company notified complainant that it would not be permitted to take possession of direct shipments at the unloading pens unless the yardage charges were paid, and that until the threat of not paying such charges was withdrawn, or until they were paid, the Yard Company would not permit livestock consigned to complainant to be delivered to it or its employees. Complainant then notified defendants that on and after May 25, 1933, the Yard Company had no authority to accept or receive livestock for complainant's account; that any delivery by defendants of complainant's livestock to the Yard Company for unloading and delivery, except as defendants' agent, would constitute a conversion of cc -

plainant's property; and that payment of yardage charges to the Yard Company made to gain possession of its property would be made by complainant under protest.

As a result of subsequent correspondence between complainant and the Yard Company, the Yard Company agreed to accept payment of the yardage charges with the understanding that such payments would be made under protest. It was also agreed that it would be understood that, with respect to each direct shipment made thereafter, complainant had made a physical demand for delivery and the right to promptly remove the stock from the premises of the Yard Company without the payment of yardage charges, and that the demand had been refused by the Yard Company. Each of the defendants refused complainant's demands. Later, in September 1935, the demands were repeated in letters sent to the defendants and were again refused.

Since May 25, 1933, in each instance in which complainant has paid yardage charges on direct shipments it has done so under protest. At stated intervals since the above date, it has rendered bills against each defendant for the amount of yardage charges paid to the Yard Company under protest.

There is no dispute with respect to the character of service in the stockyards required on direct shipments. All of such shipments have been purchased at points other than Chicago for shipment to Chicago for immediate slaughter. The livestock comprising such shipments is not fed or watered in the yards. It has not been weighed on scales of the Yard Company since 1933, when complainant installed scales tested and supervised by the Western Weighing and Inspection Bureau, an agency of defendants, on its own property where the weighing is done by complainant's employees. Complainant does not request or desire that any of its direct shipments be held or placed in holding pens. It is prepared to have crews of men ready at any hour of the day or night to move its stock from the unloading pens.

Complainant demands that defendants accord it the right to take possession of the animals at the unloading pens immediately after they are placed in such pens, and to remove them immediately from such pens through the property of the Yard Company to the nearest public street free from the payment of a yardage charge. Several suggestions as to means of egress were made. It was emphasized, however, that complainant is not demanding egress at any particular points but simply egress to a public street or highway via the shortest or most convenient way, to be designated by defendants. Because of the physical situation at the Union Stock Yards, defendants

could not provide an egress from the unloading pens to a public street, except by use of the property of the Yard Company.

As hereinbefore stated, since the establishment of the stockyards more than 70 years ago, the Yard Company has collected a yardage charge on every animal unloaded from a railroad car at the Union Stock Yards, regardless of whether the stock was consigned to a packer for immediate slaughter or to a commission merchant for sale. This custom and practice not only has prevailed at Chicago but was accepted as a reasonable practice by the interested parties until 1933, when complainant made its first protest against the practice. During a substantial portion of the period referred to, complainant not only paid the yardage charge without protest, but, in association with other packers, demanded and received participation with the Yard Company in the profits of the latter company. These facts are shown in copies of the following documents which were received in evidence: Agreement dated January 15, 1892, between the Chicago Junction Railway and Union Stock Yards Company of New Jersey, a holding company which owned practically all the stock of the Yard Company, and Philip D. Armour and others, Nelson Morris and other, and Gustavus F. Swift and others; a similar agreement of the same date, between the New Jersey Company and certain smaller packers; complaints filed in 1891 by Swift & Company, Armour & Company, and other packers against the Yard Company in the circuit court of Cook County, Ill.; answers to said complaints filed by the Yard Company; stipulations dismissing the above complaints; and extracts from a report of the Federal Trade Commission on the meat-packing industry, dated June 28, 1919.

Complainant objected to the receipt in evidence of the above-described documents. Pursuant to complainant's request, a further hearing was held to afford it an opportunity to introduce evidence relating to the documents. At the further hearing evidence bearing on certain matters embraced in the documents was introduced on behalf of complainant. At the conclusion of the further hearing before the examiner, complainant's counsel moved that the documents and the evidence bearing thereon be stricken from the record. The motion is overruled.

Since 1865, when the Yard Company began operations, there has been a line of demarcation between the services which shippers were entitled to receive for the transportation charges and the services received from the operator of the stockyards. The line-haul carriers pay the Yard Company for the unloading service and absorb the charge made for such service out of their line-haul rates. From the beginning, all shippers were required to pay to the Yard Company a yardage charge on every animal unloaded at the yards. The

amounts of these charges were determined solely by the Yard Company, the services and facilities were furnished solely by the Yard Company, and the dealings with respect to the yardage charges were solely between the Yard Company and the shippers. The practices described had been in effect for practically 25 years, when certain transactions described in the documents referred to were entered into by the Yard Company and certain packers, including complainant and intervener, under which the packers received participation in the profits from the Yard Company's operations.

The evidence shows that at some time prior to 1890 the packers had threatened to move their plants from Chicago and to establish facilities of their own for the receipt of their livestock. This was a matter of concern to the Yard Company because its revenue was received in large measure from the charges collected on livestock slaughtered by the packers. The packers had acquired a large tract of land in Indiana to be used as a new site for their plants. They had also purchased property known as the "Central Stock Yards," near the property of the Yard Company, and had erected on these premises platforms, pens, sheds, and sidings "for the purpose of receiving and distributing among themselves any and all cattle and live stock owned or purchased by them outside of the City of Chicago or directly consigned to them, and thereby avoiding the payment of yardage charges" to the Yard Company. They had also demanded, in complaints filed in Illinois, that the Yard Company be required to permit the line-haul carriers to use its tracks in making deliveries to the Central Stock Yards.

The steps taken by the packers to relieve themselves of the payment of yardage charges resulted in the execution of the contract of January 15, 1892. By the terms of this contract, the packers agreed to convey to the New Jersey Company, owner of the Yard Company, the Indiana site and the Central Stock Yards; to dismiss the suits filed in the Illinois court, and to refrain from filing similar suits during the life of the agreement, which was for 15 years; to continue their business at Packingtown for 15 years from July 1, 1891; "to guarantee that any and all live stock slaughtered by them on their premises or within 200 miles of the City of Chicago, during such period, shall pass through and use said yards, and to pay the usual yardage charge therefor;" to guarantee that the Yard Company "shall receive and collect from its yardage charges on cattle and livestock owned or purchased by or conveyed to said parties of the second part (the packers) and said companies, at said yards, the aggregate sum of at least $2,000,000 within six years," and to make up any deficiency in that amount. The packers also agreed that as long as the Yard Company conducted its busi-

ness at Chicago they would not interest themselves in any other stockyards in Chicago for the receipt and use of their own livestock.

The consideration for the above covenants by the packers was the receipt by them of income bonds of the New Jersey Company in the amount of $3,000,000. Complainant received approximately one-third of these bonds which were subsequently redeemed by the New Jersey Company.

It appears that during the existence of the agreement described, the packers, including complainant, agreed to pay the yardage charges, participated in the receipts of the Yard Company from said charges, and considered the assessment of such charges on their shipments a matter between themselves and the Yard Company. The railroad companies were not parties to the agreement, and there is nothing in the record to indicate that the packers deemed the collection of the yardage charges to be an unreasonable practice on the part of the railroad companies. On the contrary, the action of the packers shows that at the time the agreement was entered into they did not consider the assessment of the yardage charges a matter in which the railroads were in any way concerned.

The agreement of 1892 expired in 1907, except for the covenant by the packers not to use any other stockyards for the receipt of their livestock so long as the Yard Company maintained its business in Chicago. The report of the Federal Trade Commission shows, however, that stockholders of the New Jersey Company were informed that the packers were still threatening to move their plants from Chicago and that some arrangement must be made to hold them. It is shown that complainant expected to receive a share of the Yard Company's earnings as late as 1918, but there is no proof that it did receive anything in addition to the bonds received under the contract of 1892. The report definitely shows, however, that J. O. Armour, of Armour & Company, received substantial benefits after 1907 from the earnings of the Yard Company, by reason of the control he exercised with F. H. Prince of Chicago Stock Yards Company, a holding company organized by them for the purpose of controlling the New Jersey Company, which, in turn, owned the Yard Company.

The important fact is that, after the agreement of 1892 expired, the packers continued to pay the yardage charge, made no complaint to the railroads against its assessment, and for several years attempted to share in, and one of them actually did share in, the revenues received by the Yard Company. In an appearance before a Congressional committee in 1919, L. F. Swift, an official of complainant, testified as follows:

I know that we wanted this arrangement (under the 1892 contract) to continue. * * * He (Prince) told me if I would keep still and not press the matter—not move our plant or threaten to move it, keep still, I might get something after a while.

The evidence shows that for more than 70 years, under the usage and practice at the Union Stock Yards, the responsibility of the railroads in respect of direct shipments of livestock consigned to said yards has ended with the unloading service, and that by affirmative action, beginning about 1890 and continuing for many years, the packers, including complainant and intervener, insisted that the performance of the yardage service upon their shipments was a private matter between themselves and the Yard Company, unaffected by the tariffs covering the transportation charges of the railroads. The position of the packers was that their patronage of the services and facilities of the Yard Company was a thing of value to the Yard Company and that they proposed to sell that patronage to the Yard Company. They succeeded in obtaining an interest in the business of the Yard Company by threats to terminate the practice of taking delivery of their direct shipments through the agency of the Yard Company and to receive the stock at their own yards. As owners of income bonds of the Yard Company, and with a voice in its management (the general counsel of complainant was a director of the Yard Company in 1894), the packers continued to pay the yardage charges, guaranteed the earnings therefrom for a limited period, and guaranteed for an unlimited period never to receive livestock in Chicago other than at the Union Stock Yards.

The line-haul carriers have never performed services on direct shipments of livestock transported to the Union Stock Yards after it is unloaded. They have no voice in the nature of the yard services provided or in the manner in which they are performed. They have never been compensated for any services performed at the stockyards after the placement of the animals in the unloading pens. The rates applicable on livestock transported to the stockyards do not include any allowance to cover yardage services. The Yard Company furnishes the services and facilities for which the yardage charges are assessed. Prior to 1921 it fixed the measure of the charges, and since that date it has performed the same function under the supervision of the Secretary of Agriculture.

For many years the packers, including complainant, made the practice of which they now complain their own practice. They gave up their own terminal facilities at the Central Stock Yards for a substantial consideration, and, by their covenants with the Yard Company, made the Union Stock Yards their own terminal facilities in Chicago.

Under the provisions of the applicable tariffs of individual railroads serving Chicago, the shippers of livestock have the choice either of consigning it to the Union Stock Yards, and having it unloaded there, without extra charge, or of taking delivery on team tracks of the individual railroads at other points in the Chicago district. In the latter case, they unload the cars themselves. Although the facilities available at such team tracks for the unloading of livestock are not extensive, and do not include pens into which the stock may be unloaded, they have been found ample for such shipments as have been placed on such tracks for unloading. Many carloads of livestock, consigned principally to the small packers, are received and unloaded on such tracks. In addition, under the tariffs of the line-haul carriers, the packers, including complainant, may, if they choose, specify delivery of direct shipments on industry tracks serving their plants, by paying the published switching charges in addition to the line-haul rate. More than one-third of the direct shipments of livestock arriving at Chicago are unloaded at points other than the Union Stock Yards. It appears, therefore, that direct shipments of livestock are unloaded at the Union Stock Yards only when complainant elects to take delivery there.

An analysis of the billing of 3,061 cars, comprising direct shipments of livestock to complainant, unloaded at the Union Stock Yards from January 1935 to March 1938, both inclusive, shows that 84.4 percent were consigned by representatives of complainant to the Union Stock Yards, and that the remaining 15.6 percent were delivered to the stockyards, although delivery at that point was not specified in the livestock contract. Under the terms of the contract, complainant could have required delivery of the 15.6 percent of shipments either at the stockyards or on defendants' team tracks, but complainant never requested delivery of those shipments to any point other than the Union Stock Yards.

The determination of the question at issue in this proceeding requires the determination of the point at which the transportation of direct shipments of livestock to the Union Stock Yards ends. If the transportation ends when the stock is placed in unloading pens, the obligation of the defendants ceases at that point. If, however, the transportation does not end until after complainant has removed the stock beyond the boundary of the stockyards, then there is an obligation on the part of defendants to provide means by which removal of the stock may be accomplished free from the payment of a yardage charge.

Issues substantially similar to those here presented have been considered and decided in *Hygrade Food Products Corp.* v. *Atchi-*

son, T. & S. F. Ry. Co., supra, and *Atchison, T. & S. F. Ry. Co. v. United States, supra*. In the complaint in the above proceeding filed against both the line-haul carriers and the Yard Company, it was alleged that the practice of the line-haul carriers and the Yard Company in making the stockyards their terminal for delivery of livestock, pursuant to an arrangement by which the Yard Company imposed a yardage charge, was an unjust and unreasonable practice. We found that livestock consigned to complainant at the stockyards was not subject to yardage charges in instances where delivery of stock was taken by complainant at the unloading pens. Upon appeal, the Supreme Court reversed our finding, and, in its opinion, stated:

> Usage and physical conditions combine definitely to end transportation, at least in respect of these shipments, with unloading into situable pens as is now required by section 15 (5). * * * The statute cited clearly discloses the intention that jurisdiction of the Secretary shall not overlap that of the Commission. The boundary is the place where transportation ends.

It is to be noted that the Supreme Court stated that, in respect of the particular shipments involved, transportation ended at the unloading pens.

The Court also found that section 15 (5) of the Interstate Commerce Act "left undisturbed the Yard Company's practice of making a charge for livestock received," and that the Packers and Stockyards Act, enacted about a year later, defined the practice of the assessment of yardage charges as a stockyard's practice, and subjected the services for which the charges were made to the jurisdiction of the Secretary of Agriculture.

Complainant here contends that the issue in this proceeding differs from that decided in the *Hygrade case*; that the complainant in the *Hygrade case* was using runways, alleys, an overhead viaduct, and a tunnel belonging to the Yard Company; and that it was, in effect, demanding that the carriers provide a delivery beyond their own terminals into the Hygrade plant, whereas complainant here is demanding only egress from the unloading pens to the nearest public street. The alleged difference is not one of substance, because the evidence in this proceeding shows that alleys, ways, and, in some instances, overhead viaducts belonging to the Yard Company must be used to remove animals from the unloading pens to the public streets. In the *Hygrade case* it was shown that possession of a substantial portion of complainant's shipments was taken by complainant at the unloading pens, and the Supreme Court stated that, with respect to such shipments, transportation ended at the unloading pens.

Reference is made by complainant to certain language[3] of the Court as a clear intimation that the consignee of the livestock was and is entitled to a mere egress and a mere way out of the stockyards. Such an interpretation of the language referred to is inconsistent with the statement of the Court that "Usage and physical conditions combine definitely to end transportation, at least in respect of these shipments, with unloading into suitable pens as is now required by section 15 (5)." In the statement referred to by complainant, the Court was contrasting the situation at public stockyards with the situation at livestock terminals other than public stockyards, and it did not draw a contrast between a route through public yards to a street and thence to a packing plant with a route through public yards to the street. The evidence here conclusively shows that there is no essential difference between the routes and the services required from the unloading pens to plants outside the stockyards and a way out to the public highways. In either case, property of the yard company must be used.

Emphasis is placed by complainant on the provisions of the act which define "transportation" and to the inclusion in that term of the word "delivery," and it is contended that our jurisdiction is coextensive with transportation as defined in section 1 (3) of the act, including all services in connection with the delivery of livestock. Decisions are cited which hold, in effect, that property shipped remains in transportation until there is actual delivery to the consignee, and that delivery is not accomplished until the property is taken away from the carrier's station. This is true of traffic generally, but transportation of livestock to public stockyards and the delivery embraced therein is provided for in a particular section of the act.

The provision of the act which differentiates between livestock and other carload freight with respect to the unloading service is the amendment made in 1920 to section 15 embodied in paragraph 5 of that section. The material portion of the amendment is as follows:

> Transportation wholly by railroad of ordinary livestock in carload lots destined to or received at public stockyards shall include all necessary service of unloading and reloading en route, delivery at public stockyards of inbound shipments into suitable pens, and receipt and loading at such yards of outbound shipments, without extra charge therefor to the shipper, consignee or owner, except in cases where the unloading or reloading en route is at the

[3] "So the long established and uniform practice to provide a route via the overhead runway to the Hygrade plant distinguishes the use of the Yard Company's properties for this service from mere egress such as is included in the transportation of live stock to destinations other than public stockyards. Plainly there is an essential difference between the route from unloading pens to consignee's plant and a mere way out to the public highways."

request of the shipper, consignee or owner, or to try an intermediate market, or to comply with quarantine regulations.

There is nothing in the amendment which imposes an obligation upon defendants to compensate the public stockyards for the use of the facilities necessarily involved in removing the direct shipments from the suitable pens to the boundary of the Yard Company's property. It would appear that had such been the intention of Congress, the words "delivery at public stockyards of inbound shipments into suitable pens" would have read "into suitable pens and from those pens to the boundary of the stockyards." The amendment indicates an intention by Congress to constitute the pens as the point where the duties of the defendants terminate. The word "suitable" is descriptive of the character of the pens into which the stock must be unloaded and does not, under a reasonable interpretation of the language used, refer to the character of egress from the pens to the boundary of the yards.

Complainant takes the position that there is nothing in the language of section 15 (5) that narrows or restricts our jurisdiction; that the provision is remedial and is entitled to a liberal interpretation that fairly accomplishes its purpose; that under such an interpretation it would seem that a pen from which it is impossible for a consignee, who is on hand when his stock is unloaded, to take his shipments without extra charge cannot be a suitable pen; that there is nothing in the provision to indicate that Congress meant to take away the opportunity to obtain complete possession of the property at destination; and that the contention that our jurisdiction ends at the unloading pens comprehends the proposition that defendants' common-law duty has been reduced by section 15 (5).

The sole purpose of the amendment to section 15 was to deal permanently and by legislation with the then-pending controversy, later considered by the Supreme Court in *Adams* v. *Mills*, 286 U. S. 397. For almost 50 years prior to the decision of the Supreme Court in 1912, holding the Yard Company to be a common carrier,[4] it had maintained two charges—a charge for unloading the livestock, and a yardage charge imposed on all animals in addition to the unloading charge. The unloading charge had always been absorbed by the line-haul carriers, and the yardage charge had always been paid to the Yard Company by the shippers. Effective May 30, 1913, the Yard Company filed a tariff with us in which it published its charge for the unloading service. Neither that tariff nor any other tariff ever filed by the Yard Company with us included its yardage charges. In 1917 the Yard Company increased its unloading charge

[4] *United States* v. *Union Stock Yard & Transit Co., supra.*

from 25 to 50 cents per car; the line-haul carriers refused to absorb the increase, and the additional amount was collected by the Yard Company from the shippers. The livestock producers protested the collection of the unabsorbed 25 cents per car and filed a complaint with us to recover it. The producers did not complain against the yardage charge they were then paying, nor have they ever complained against the assessment of that charge. It is significant that at that time the producers were concerned actively with the question of where transportation should be held to end, both by opposing the assessment of an additional charge for unloading and by advocating the amendment to section 15, subsequently enacted.

The amendment originated with and was sponsored by the National Live Stock Shippers League and the American Live Stock Association, which were producers' organizations. Senator Cummins, in proposing the amendment, said:

> I am entirely in sympathy with the purpose of these shippers, and want to bring the whole subject within the jurisdiction of the Interstate Commerce Commission, and compel the carriers to state in the published tariffs the rates that must be paid by the shippers for the entire service of taking property at the point of origin and *delivering it to the point at which it is to leave the car.* [Emphasis supplied.]

Later, in 1921, when introducing the Packers and Stockyards Act in the House of Representatives, Congressman Haugen stated:

> It is proposed to give the Secretary of Agriculture * * * jurisdiction from the time the livestock is unloaded at the terminal yards and after it is out of the jurisdiction of the Interstate Commerce Commission. *Up to the time of unloading the livestock the Interstate Commerce Commission has jurisdiction* * * *. Hence, it is proposed that the Secretary's jurisdiction shall begin where the Interstate Commerce Commission's jurisdiction ends * * *. [Emphasis supplied.]

Evidence of the intent of section 15 (5) is to be found in the interpretation placed upon it from the date of its enactment both by the packers and the producers. In 1921 pursuant to all requirements of the Packers and Stockyards Act, the Yard Company filed a tariff with the Secretary of Agriculture, in which it published the yardage charges which it had previously assessed on all animals unloaded in the yards. No complaint has ever been made by the producers who sponsored the amendment regarding the payment of the yardage charge.

Additional evidence of the intent of section 15 (5) is to be found in the conduct of complainant and other packers since its enactment. When the amendment was proposed, the yardage charges had long been a matter of concern to the packers. They had sought to avoid the payment of the charges by threatening to move their plants and by acquiring the Central Stock Yards; they had sued the Yard

Company to compel it to permit delivery of direct shipments over its rails at the Central Stock Yards; and, upon receiving an interest in the Yard Company's business under the contract of 1892, they gave up the Central Stock Yards and continued to pay yardage charges. For a number of years after expiration of the contract of 1892 they had sought to have the arrangement under which they participated in the Yard Company's profits renewed. The acquiescence by the packers in the assessment of the yardage charge is evidence that they did not believe that section 15 (5) could reasonably be given the meaning they now urge.

The packers' interpretation of the amendment is also shown by their affirmative action. The first case to present the question of the effect of section 15 (5) on the yardage charges on direct shipments arose in connection with charges made by the Fort Worth Stock Yards Company, a public stockyard. *Southwestern Horse & Mule Assn.* v. *A., T. & S. F. Ry. Co.*, 129 I. C. C. 730 (1927). The stockyards company successfully contended that we had no jurisdiction of the yardage charge because, under section 15 (5) the transportation of livestock to public stockyards terminated with the unloading. That company's policies were controlled by Swift & Company and Armour & Company, complainant and intervener herein, which owned 66.8 percent of the voting stock. It also appears that on July 1, 1928, at several public stockyards in which the packers held a substantial interest, yardage charges were being assessed on direct shipments. The date of July 1, 1928, was selected because, at that time, the packers were in unlimited possession and control of voting stock of the yard companies referred to.

Direct shipments of livestock transported by rail to packers at Chicago have exceeded 30,000 carloads annually for several years, as compared with a total annual average rail movement to the Union Stock Yards of 94,629 cars. The shift from producers' consignments to direct shipments is rapidly increasing. The evidence fails to disclose how, as a practical matter, an annual volume of 30,000 carloads of livestock could be discharged into and handled through the public streets of Chicago.

Reference is made both by complainant and defendants to proceedings before us in which the question of yardage charges has been considered. An examination of the cases cited shows that in only two of them has the question here presented been determined.

The first case, after the enactment of section 15 (5), in which the question was raised was *Southwestern Horse & Mule Assn.* v. *A., T. & S. F. Ry. Co., supra.* There we held that the yardage charges on direct shipments of livestock consigned to a public stockyard for dealers whose places of business were outside the yards

were beyond our jurisdiction. The basis for our finding was that transportation to public stockyards ended when the animals were unloaded into suitable pens.

The other case in which an issue similar to the issue herein was considered was *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co., supra.* There complainant's employees had taken possession of approximately 15 percent of their direct shipments at the unloading pens of the Union Stock Yards in Chicago and had driven such shipments through the yards to its plant. In such instances, we found the assessment of yardage charges unlawful. As hereinbefore shown, the Supreme Court stated that, with respect to the shipments in question, transportation ended when the animals were placed in the unloading pens.

Since the decision of the Supreme Court in the *Hygrade case*, the Court and we have interpreted that decision as holding that transportation of direct shipments of livestock to a public stockyard terminates at the unloading pens. See *Denver Union Stock Yard Co.* v. *United States*, 304 U. S. 470; *Livestock to or from Union Stock Yards, Chicago*, 222 I. C. C. 765.

In the administration of the Packers and Stockyards Act, the Secretary of Agriculture has asserted jurisdiction of yardage charges covering mere egress at many public yards. Orders of the Secretary precribing the charges for this service at three public stockyards have been sustained in court proceedings. See *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38; *Denver Union Stock Yards Co.* v. *United States, supra*; *Union Stock Yards Co. of Omaha* v. *United States*, 9 Fed. Supp. 864. The yardage charges now applicable at the public stockyards at St. Joseph, Mo., Denver, Colo., and Omaha, Nebr., for use of facilities and services of the yard companies in connection with egress for direct shipments consigned to packers are those prescribed by the Secretary.

Defendants contend that we cannot enter an effective order in this complaint granting the relief sought, because the Yard Company is an indispensable party and is not named a defendant. It points out that the Yard Company is a common carrier subject to the act and is solely responsible for the practice complained of; that it levies, collects, and retains for itself the yardage charge; that it denies use of its property unless the yardage charges are paid to it; and that it alone can modify or permit the modification of the charges and practices complained of. In view of our findings herein, it is unnecessary to determine this question.

The language of section 15 (5) specifies the services to be included in the transportation to public stockyards, and it clearly states that it shall include delivery into suitable pens. That does not mean

delivery to a public street, delivery to a plant connected by a runway or viaduct with the stockyards, or delivery to a private way which may lead from the stockyards proper. It means delivery into pens on the stockyards' property which are suitable to receive the stock in a safe manner. Had Congress intended to require delivery of the stock beyond the boundary of the public stockyards, it would have so stated. The kind of transportation covered by the provision is transportation to public stockyards, as distinguished from transportation to other than public stockyards. It would be unreasonable to assume, in view of the express language used, that the term transportation was intended to include not only delivery into suitable pens but also the removal from such pens to the public highways.

The above interpretation is the interpretation placed upon the amendment since its enactment by the actions of the packers, including complainant and intervener, of the producers, of the Yard Company, and of the railroads. For more than 50 years prior to the enactment of section 15 (5) and since its enactment, usage and physical conditions combined to end transportation on direct shipments of livestock at the unloading pens. The packers, including complainant and intervener, not only acquiesced in the usage and practice but, in addition, by their agreements with the Yard Company and their participation in the earnings of that company received from its yardage charges, by their guarantee for a limited period of earnings to the Yard Company, and by other acts hereinbefore described, have concurred in the practice and have made it their own.

In the *Hygrade case* the Supreme Court stated that, with respect to shipments of which the complainant took possession at the unloading pens, the transportation ended at the unloading pens. There is no difference in principle between the issue in the *Hygrade case* and the issue in this proceeding. The yardage charge is collected on complainant's shipments when it takes possession of the animals at the unloading pens, and in the *Hygrade case* it was collected on that portion of the shipments of which possession was taken at the unloading pens. With respect to such shipments, the Supreme Court stated that the obligation of the line-haul carriers ceased when the animals were placed in the unloading pens.

We find that the transportation of direct shipments of livestock consigned to complainant at the Union Stockyards in Chicago, Ill., ends when the livestock has been unloaded into the unloading pens at the Union Stock Yards. We further find that the yardage charges assessed by the Union Stock Yards and Transit Company of Chicago on direct shipments of livestock, as defined in this report,

transported to the Union Stock Yards, for services performed and facilities used beyond the gates leading from the pens in the stockyards into which the livestock is unloaded from railroad cars, are not subject to our jurisdiction.

We further find that defendants' failure to afford egress for shipments of livestock described in the preceding paragraph free from the payment of yardage charges has not resulted and does not result in an unreasonable practice.

The complaint will be dismissed.

ALLDREDGE, *Commissioner*, dissenting:

In my judgment the report in this case misconstrues the opinion of the Supreme Court in *Atchison, T. & S. F. Ry. Co.* v. *United States*, 295 U. S. 193. Reliance is placed upon one statement contained therein to the effect that transportation of livestock destined to public stockyards ends upon the unloading of the stock into suitable pens. A correct construction of the opinion of the Court is, I believe, that the Court did not consider that the question of free egress from the stockyards was presented for decision, that the Court did not itself undertake to say that the transportation ended with delivery into unloading pens, and that it set aside the findings in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, 195 I. C. C. 553, not because they were wrong in principle, but because they were technically inadequate.

Neither am I able to find anything in the Court's opinion revealing a purpose to set aside the principles enunciated in *Covington Stock-Yards Co.* v. *Keith*, 139 U. S. 128, relied upon by us in *Hygrade Food Products Corp.* v. *Atchison, T. & S. F. Ry. Co.*, *supra*, and likewise specifically applicable to the facts and circumstances disclosed in the instant proceeding. It was there said (pages 135–136):

> A carrier of live stock has no more right to make a special charge for merely receiving or merely delivering such stock, in and through stock yards provided by itself, in order that it may properly receive and load, or unload and deliver, such stock, than a carrier of passengers may make a special charge for the use of its passenger depot by passengers when proceeding to or coming from its trains, or than a carrier may charge the shipper for the use of its general freight depot in merely delivering his goods for shipment, or the consignee of such goods for its use in merely receiving them there within a reasonable time after they are unloaded from the cars. If the carrier may not make such special charges in respect to stock yards which itself owns, maintains or controls, it cannot invest another corporation or company with authority to impose burdens of that kind upon shippers and consignees. The transportation of live stock begins with their delivery to the carrier to be loaded upon its cars, and ends only after the stock is unloaded and delivered, or offered to be delivered, to the consignee, if to be found, at such place as admits of their being safely taken into possession.

Consistent with the principles set forth in the foregoing excerpt from the opinion of the Court I think we should here find that defendants' transportation obligations do not end with delivery of the stock into unloading pens, and that it is their duty under the law to afford through their agent, the stockyard company, access to the property of the latter for removal of their livestock therefrom, within a reasonable time after it has been placed in unloading pens, and without the payment of any special toll or charge, and that the transportation does not end until the obligations above set forth have been fulfilled.

CHAIRMAN EASTMAN and COMMISSIONER AITCHISON did not participate in the disposition of this case.

U. S. GOVERNMENT PRINTING OFFICE: 1940

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Kenneth J. Carrick, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 179 to 198, inclusive, contain a true copy of a decision of the Interstate Commerce Commission decided April 8, 1940 in Number 27862, Swift & Company *et al, vs.* Alton Railroad Company *et al,* as the same appears on pages 31 to 59 inclusive of the Petition of Plaintiff Appellant for Rehearing and Motion for order remanding the cause to the Lower Court for Trial etc. filed in this Court on April 19, 1940 and which was not included in the record prepared by the Clerk of this Court for use in connection with a petition for a writ of certiorari in the case of

Cause No. 7030

Armour and Company, a corporation,
Plaintiff-Appellant,

vs.

The Alton Railroad Company, a corporation, *et al.,*
Defendants-Appellees,

as the same remains upon the files and records of the United States Circuit Court of Appeals for the Seventh Circuit.

In Testimony Whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this Fifth day of September, A. D. 1940.

Kenneth J. Carrick,
(Seal) *Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.*